APPEAL NO. 051030
FILED JUNE 20, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on March 31, 2005. The issues at the CCH were:

1. Has the respondent (claimant) reached maximum medical improvement (MMI), and if so, on what date?

2. What is the claimant's impairment rating (IR)?

3. Did the first certification of MMI and IR assigned by (Dr. W) on January 22, 2004, become final, or did the certification of MMI and IR by (Dr. B) on May 25, 2004, become final, or did no certification of MMI and IR become final?

4. Did the claimant have disability resulting from an injury sustained on _____, and if so, for what period?

The hearing officer resolved the disputed issues by deciding as follows:

1. The claimant has not reached MMI.

2. The claimant's IR cannot be determined because the claimant has not reached MMI.

3. The first certification of MMI and IR by Dr. W did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.12(c) (Rule 130.12(c)).

4. The certification of MMI and IR by Dr. B did become final under Rule 130.12(b).

5. The certification of MMI and IR by Dr. B is against the great weight of the other medical evidence.

6. For the time period from October 7, 2004, through the date of the CCH, the claimant did have disability beginning on October 7, 2004, and continuing through the date of this hearing.

The appellant (carrier) appeals the hearing officer's decision on MMI, IR, and disability. The claimant requests affirmance of the hearing officer's decision and asserts that the carrier's appeal was not timely filed with the Texas Workers' Compensation Commission (Commission). There is no appeal of the hearing officer's determination that the certification of MMI and IR by Dr. B became final.

DECISION

Affirmed in part and reversed and rendered in part.

TIMELINESS OF THE CARRIER'S APPEAL

Section 410.202(a) provides that to appeal the decision of a hearing officer, a party shall file a written request for appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code from the computation of time in which to file an appeal or a response. Rule 143.3(e) provides that a request for appeal shall be presumed to be timely filed if it is: (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision; and (2) received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. Both portions of Rule 143.3(e) must be complied with for an appeal to be timely. Texas Workers' Compensation Commission Appeal No. 042688, decided December 1, 2004.

Rule 102.5(d) provides in pertinent part that for purposes of determining the date of receipt for those written communications sent by the Commission which require the recipient to perform an action by a specific date after receipt, unless the great weight of the evidence indicates otherwise, the Commission shall deem the received date to be the first working day after the date the written communication was placed in a carrier's (City) representative's box located at the Commission's main office in (City) as indicated by the Commission date stamp. *See also* Rule 143.3(d)(2) regarding deemed receipt of the hearing officer's decision the first working day after the date the written communication was placed in the carrier's (City) representative's box, unless the great weight of evidence indicates otherwise.

A date stamp on the cover letter to the hearing officer's decision reflects that it was placed in the carrier's (City) representative box on April 13, 2005. The carrier's (City) representative provided a signed acknowledgment of receipt on April 13, 2005. The first working day after April 13, 2005, was Thursday, April 14, 2005. The deemed date of receipt, that being the first working day after the hearing officer's decision was placed in the carrier's (City) representative's box, is the date to be used in determining the receipt date, and not the earlier signed acknowledgment of receipt by the carrier's (City) representative. Trinity Universal Insurance Company v. Day, 155 S.W.3d 337 (Tex. App.-El Paso 2004, pet. denied); Texas Workers' Compensation Commission Appeal No. 050897-s, decided June 2, 2005. The 15th day after April 14, 2005, excluding Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code, was Friday, May 6, 2005, and the 20th day was Friday May 13, 2005. The carrier's appeal is dated May 6, 2005, and contains a U.S. postage meter stamp of that date, and the Commission received the mailed appeal on May 12, 2005 (a

faxed copy was received on May 9, 2005). We conclude that the carrier's appeal was timely filed with the Commission.

BACKGROUND INFORMATION

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that on _____, she was lifting a box of keyboards from a shelf at work when the box dragged her to the floor. She said she felt a pull on her whole left side and had pain in her low back, neck, arms, and legs. The claimant said she continued to work until March 8, 2004. She went to (Dr. C), a chiropractor, on January 16, 2004, and filled out a patient information form, indicating that her hands and arms were going numb and that she had low back pain. The claimant said that she started treating with Dr. C in February 2004 and that Dr. C took her off work on March 8, 2004. The employer sent the claimant to a medical center on January 22, 2004, where she was diagnosed as having back pain and released to regular work duty by Dr. W. A Report of Medical Evaluation (TWCC-69) dated January 22, 2004, notes that Dr. W is the certifying doctor and that the claimant reached MMI on January 22, 2004, with no permanent impairment. The January 22, 2004, TWCC-69 is not signed by Dr. W, the certifying doctor. The claimant said that she received Dr. W's TWCC-69 over two weeks after January 22, 2004. On April 23, 2004, the claimant's attorney filed a Request for Designated Doctor (TWCC-32) to dispute Dr. W's TWCC-69. The claimant's attorney noted in the cover letter with the TWCC-32 that Dr. W's TWCC-69 was invalid because it was not signed, that the claimant was not at MMI, and that the claimant has permanent impairment.

The claimant went to (Dr. N) on May 7, 2005, and Dr. N noted that the claimant had a neck and back injury with neuropathy pain left side lower extremity and assessed the claimant as having back and neck pain. Dr. N wrote that the claimant is not even able to perform light duty.

On April 30, 2004, the Commission appointed Dr. B as the designated doctor for the purpose of evaluating the claimant for MMI and IR. Dr. B examined the claimant on May 25, 2004, and in a signed TWCC-69 dated May 25, 2004, certified that the claimant reached MMI on May 25, 2004, with a 0% IR utilizing the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). Dr. B's narrative report reflects that the claimant injured her cervical spine and lumbar spine at work on _____; that the claimant had no objective sensory or motor deficits of the lumbar spine and lower extremities or of the cervical spine and upper extremities; that the claimant had no significant clinical findings; and that the claimant was assigned 0% impairment under Diagnosis-Related Estimates (DRE) Lumbosacral Category I and 0% impairment under DRE Cervicothoracic Category I. Dr. B noted in his physical examination report that the claimant was complaining of radiating low back pain. Dr. B also noted that x-ray reports of the lumbar spine stated that the lumbar spine showed severe degenerative changes with transitional vertebra L5/S1 and spondylolysis at L5-S1, and that cervical x-ray

reports showed reduced lordosis with severe degenerative changes throughout. Dr. B also noted reduced range of motion (ROM) of the lumbar spine and cervical spine with pain. Dr. B diagnosed the claimant as having a cervical spine strain with spondylosis and a lumbar spine strain with spondylosis.

The claimant said that she received Dr. B's TWCC-69 in the mail a week after Dr. B's May 24, 2004, evaluation, and that she discussed Dr. B's report with Dr. C.

On a copy of Dr. B's TWCC-69, Dr. C indicated his disagreement with the MMI date and IR assessed by Dr. B, and in a letter dated July 2, 2004, wrote that the claimant is not at MMI because it had been impossible to get the claimant appropriate care, including referrals and evaluations such as an MRI and EMG/NCV to address her radicular complaints into the left foot. Dr. C also wrote that the claimant should at least be placed in DRE Category II for both her lumbar and cervical spine for at least a 10% IR and that the IR would be higher if the ROM model were used. The claimant said that she filed Dr. C's letter with the Commission on July 8, 2004.

On October 22, 2004, the claimant's attorney filed a Request for Benefit Review Conference (TWCC-45) for the purpose of disputing Dr. B's MMI/IR determinations.

A lumbar spine MRI report dated November 3, 2004, provides an impression of slight degenerative spondylolisthesis of L5 upon S1 with mild degenerative disc disease with marked facet arthropathy bilaterally; a 2-3 mm disc protrusion at L4-5 emanating from a mildly dehydrated/desiccated disc with mild facet arthropathy bilaterally; and a 2-3 mm disc protrusion at T12-L1 emanating from a mildly dehydrated/degenerated disc.

The Commission sent Dr. C's letter of July 2, 2004, to Dr. B, and in a letter dated November 9, 2004, Dr. B wrote that his examination of the claimant on May 25, 2004, showed that muscle strength was good and equal in the upper and lower extremities; that there was no muscle atrophy in either the upper or lower extremities; that DTRs were 2/4 in the extremities and equal bilaterally; that sensory examination was intact in both the upper and lower extremities; and that both the cervical and lumbar spine showed reduced motion, secondary to pain. Dr. B also stated that the claimant sustained a strain injury to her cervical and lumbar areas, and that based on a review of the medical documentation, his examination of the claimant, and the AMA Guides, the claimant was appropriately assessed a 0% IR for both her cervical and lumbar spine.

In a TWCC-69 dated March 11, 2005, Dr. C certified that the claimant was not at MMI; and in a narrative report listed the claimant's medical history, including an MRI of the neck of November 4, 2004, which he noted showed a "3 mm disc at C5-6," and the MRI of the lumbar spine; and stated that the claimant remains unable to get appropriate care due to continued denials by the carrier. Dr. C further stated that he had been unable to get further appropriate diagnostic studies or appropriate referrals, or to complete a reasonable and necessary treatment program with the claimant. The hearing officer noted that based on ICD-9 Codes, Dr. C diagnosed the claimant as

having displacement lumbar intervertebral disc without myelopathy, displacement of cervical disc without myelopathy, sciatica, and muscle spasm.

Dr. C referred the claimant to (Dr. PN) for electrodiagnostic testing on March 29, 2005. With regard to the upper extremities, Dr. PN's handwritten EMG/NCV report states an impression of evidence of bilateral chronic C5-6 radiculopathy with no acute changes noted, and chronic bilateral carpal tunnel syndrome (CTS). With regard to the lower extremities, Dr. PN's report states an impression of chronic left L5 radiculopathy with no acute changes noted.

Dr. N, the doctor who examined the claimant on May 7, 2004, reported that he had again examined the claimant on January 17, 2005, and that the claimant is not able to work in any kind of work until her back problem is solved. The claimant said that she has been unable to work since March 2004 and that no doctor has released her to work in any capacity since she stopped working.

A prior CCH was held on October 6, 2004, before a different hearing officer and that hearing officer determined that the claimant sustained a compensable injury on _____; that she gave timely notice of injury to her employer; and that she had disability resulting from her compensable injury of _____, on March 5, 2004, and for the period beginning March 10, 2004, and continuing through May 24, 2004, but not otherwise. There is no indication that the CCH decision from the October 6, 2004, CCH was appealed.

FINALITY UNDER SECTION 408.123 AND RULE 130.12, MMI, AND IR

Section 408.123(d) provides that except as provided in Subsections (e), (f), and (g), the first valid certification of MMI and the first valid assignment of IR to an employee are final if the certification of MMI and/or the assigned IR is not disputed within 90 days after written notification of the MMI and/or assignment of IR is provided to the claimant and the carrier by verifiable means. Section 408.123(e) provides that the first certification of MMI and/or IR may be disputed after the 90-day period if: (1) there is compelling medical evidence establishing the following: (A) a significant error on the part of the certifying doctor in applying the appropriate AMA Guides and/or calculating the IR; (B) a clear misdiagnosis or a previously undiagnosed condition; or (C) prior improper or inadequate treatment of the injury which would render the certification of MMI or IR invalid. Rule 130.12(a) provides in pertinent part that the certifications and assignments that may become final are: (1) the first valid certification of MMI and/or IR assigned or determination of no impairment. Rule 130.12(b)(4) provides that the first certification of MMI and/or IR may be disputed after the 90-day period as provided in Section 408.123(e). Rule 130.12(c) provides that a certification of MMI and/or IR assigned as described in subsection (a) must be on a Form TWCC-69, Report of Medical Evaluation, and that the certification on the TWCC-69 is valid if: (1) there is an MMI date that is not prospective; (2) there is an impairment determination of either no impairment or a percentage IR assigned; and (3) there is the signature of the certifying

doctor who is authorized by the Commission under Rule 130.1(a) to make the assigned impairment determination.

There is no appeal of the hearing officer's determination that the January 22, 2004, MMI/IR certification of Dr. W did not become final under Rule 130.12 because it was invalid as it was not signed by Dr. W in compliance with Rule 130.12(c)(3). There is also no appeal of the hearing officer's findings that Dr. B, the designated doctor, certified that the claimant reached MMI on May 25, 2004, with a 0% IR; that Dr. B's TWCC-69 is valid and in compliance with Rule 130.12; that the claimant received Dr. B's TWCC-69 in the mail on June 1, 2004; and that on or before August 30, 2004, the claimant did not dispute the certification of Dr. B in accordance with Rule 130.12(b).

The hearing officer made the following pertinent findings of fact and conclusions of law with regard to the issues of finality, MMI, and IR:

FINDINGS OF FACT

11. [Dr. B's] May 25, 2004 certification of [MMI] and [IR] became final in accordance with Rule 130.12.

12. Prior to the appropriate diagnostic testing, the Claimant's medical condition was clearly mistakenly diagnosed or undiagnosed by [Dr. W], [Dr. C], and [Dr. B].

13. Prior to the May 25, 2004, certification and assignment of [MMI] and [IR] by [Dr. B], the Claimant received improper or inadequate treatment for her injury.

14. According to Rule 130.12(b)(4) and Section 408.123(e) of the Act, the certification of [MMI] and [IR] may be disputed.

15. The certification of [MMI] and [IR] by the designated doctor is contrary to the great weight of the other medical evidence.

CONCLUSIONS OF LAW

3. The Claimant has not reached [MMI].

4. The Claimant's [IR] cannot be determined because the claimant has not reached [MMI].

6. The certification of [MMI] and [IR] by [Dr. B] did become final under Rule 130.12(b).

7. The certification of [MMI] and [IR] by [Dr. B] is against the great weight of the other medical evidence.

The carrier appeals Findings of Fact Nos. 12, 13, 14, and 15 and Conclusions of Law Nos. 3, 4, and 7. The carrier does not appeal Finding of Fact No. 11 that Dr. B's May 25, 2004, certification of MMI and IR became final in accordance with Rule 130.12 or Conclusion of Law No. 6. that the certification of MMI and IR by Dr. B did become final under Rule 130.12(b).

With regard to the appealed findings of fact and conclusions of law, the carrier contends that the hearing officer made contradictory findings and conclusions and mistakenly considered an extent-of-injury issue that was not before the hearing officer. The carrier also contends that because the hearing officer determined that Dr. B's MMI/IR certification became final, it cannot be rendered "null and void;" that the hearing officer failed to use a standard of "compelling medical evidence" as set forth in Section 408.123(e) in rendering Dr. B's MMI/IR certification "null and void;" and that Dr. B's findings are not contrary to the other medical evidence and should be given presumptive weight.

We conclude that in considering the exceptions to finality set forth in Section 408.123(e), the hearing officer failed to make a determination that there was "compelling medical evidence" establishing one or more of the exceptions. We further conclude that there is not compelling medical evidence of a clear misdiagnosis or a previously undiagnosed condition, or of prior improper or inadequate treatment of the injury which would render Dr. B's certification of MMI or IR invalid. Dr. B clearly understood from the x-rays that the claimant had degenerative disc conditions in her lumbar and cervical spine and that physical examination revealed no objective signs of radiculopathy. There is no showing that the incidental finding on EMG testing of CTS has anything to do with the compensable back and neck injury. Dr. C states that the claimant has not had appropriate care, but it is too uncertain as to what type of medical care he thinks should be undertaken.

We reverse Findings of Fact Nos. 12 and 13 as not being based on compelling medical evidence as is required under Section 408.123(e). Findings of Fact No. 11 and Conclusion of Law No. 6 that Dr. B's certification of MMI/IR have became final under Rule 130.12(b) have not been appealed. Because Dr. B's certification of MMI/IR was not timely disputed and no exception to finality has been established by compelling medical evidence, Dr. B's MMI/IR certification did become final, as was determined by the hearing officer in unappealed Finding of Fact No. 11 and Conclusion of Law No. 6. Accordingly, we reverse Finding of Fact No. 14 that the certification of MMI and IR may be disputed. We also reverse Finding of Fact No. 15 and Conclusion of Law No. 7 that Dr. B's certification of MMI/IR is against the great weight of the other medical evidence and we reverse Conclusions of Law Nos. 3 and 4 that the claimant has not reached MMI and that impairment cannot be determined. We render a decision that the claimant reached MMI on May 25, 2004, with a 0% IR as certified by Dr. B, the designated doctor, because Dr. B's certification of MMI/IR became final under Section 408.123(d).

DISABILITY

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The hearing officer determined that the claimant had disability from October 7, 2004, through the date of the CCH. The carrier contends that the claimant failed to prove that she had disability. The claimant's testimony and some of the medical reports from the doctors who have examined the claimant support the hearing officer's decision on the disability issue and we do not find it to be so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The carrier also contends that the claimant could not have disability after she reached MMI on May 25, 2004. The Appeals Panel has previously explained that disability and MMI are different concepts under the 1989 Act, and that while a claimant's entitlement to temporary income benefits ends when he or she reaches MMI, disability as defined by Section 401.011(16) does not necessarily end on that date. *See* Texas Workers' Compensation Commission Appeal No. 992069, decided October 28, 1999. We affirm the hearing officer's determination on the disability issue.

CONCLUSION

The hearing officer's determinations that the claimant has not reached MMI, that the IR cannot be determined, and that Dr. B's certification of MMI/IR is against the great weight of the other medical evidence are reversed and a decision is rendered that the claimant reached MMI on May 25, 2004, with a 0% IR as certified by Dr. B, the designated doctor, whose MMI/IR certification became final under Section 408.123(d). We affirm the hearing officer's determination that the claimant had disability from October 7, 2004, through the date of the CCH.

The true corporate name of the insurance carrier is **HARTFORD CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge